MAR 2 1 19
JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 11

UNITED STATES GYPSUM COMPANY,
Appellant,

vs.

NATIONAL GYPSUM COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING OF APPELLEE NATIONAL GYPSUM COMPANY.

SAMUEL I. ROSENMAN,
ELMER E. FINCK,
SEYMOUR D. LEWIS,
MALCOLM A. HOFFMANN,
SEYMOUR KRIEGER,
GILBERT S. EDELSON,
Attorneys for National Gypsum Company.

Of Counsel:

FINCK & HUBER,
804 Liberty Bank Building,
Buffalo 2, New York.

ROSENMAN GOLDMARK COLIN & KAYE,
575 Madison Avenue,
New York 22, New York.

SEYMOUR KRIEGER,
777 Fourteenth St., N. W.,
Washington 5, D. C.

INDEX.

	PAGE
SUMMARY	2
ARGUMENT:	
I. The plain errors of fact in the Court's opinion	5
A. The violation was more than price-fixing—it included monopolization and additional restraints	5
B. The undisputed facts underlying the adjudications as well as the license agreements themselves proved more than agreement to fix prices	7
C. The Court misinterpreted its 1950 opinion	11
II. The Court's errors were made *sua sponte*	14
III. The Court's factual errors formed the basis of its two controlling rulings	15
CONCLUSION	20
CERTIFICATE	21

Table of Cases

	PAGE
B. B. Chemical Co. v. *Ellis*, 314 U. S. 495 (1942)	17
Hartford-Empire Co. v. *United States*, 323 U. S. 386 (1945), 324 U. S. 570 (1945)	4, 13, 15, 16
Morton Salt Co. v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942)	18
United States v. *National Lead Co.*, 332 U. S. 319 (1947)	4, 13, 16, 19
United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948)	8, 9, 10
United States v. *United States Gypsum Co.*, 339 U. S. 960 (1950)	2
United States v. *United States Gypsum Co.*, 340 U. S. 76 (1950)	7, 10
United States Gypsum Co. v. *United States*, 339 U. S. 959 (1950)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 11.

UNITED STATES GYPSUM COMPANY,

Appellant,

vs.

NATIONAL GYPSUM COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING OF APPELLEE NATIONAL GYPSUM COMPANY.

Appellee, National Gypsum Company (hereinafter "National") petitions the Court for rehearing in the above matter on the grounds that:

(1) the Court's opinion contains two plain errors of fact;

(2) these two errors were committed by the Court *sua sponte* so that National was deprived of the opportunity for briefing and argument, and

(3) these erroneous facts form the basis of two rulings by this Court which have resulted in reversal of the decree below.

Summary.

1. The first erroneous statement of fact by the Court is that the only violation found by the original District Court, on which it granted summary judgment in 1949, was price-fixing.*

This statement is in error. It conflicts with the express holding by this Court in 1950 (339 U. S. 960), which affirmed the District Court's 1949 finding of monopolization as well as price-fixing as follows:

> "Article III of the decree of the District Court of November 7, 1949, reading as follows:
>
> 'The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and *have monopolized trade and commerce in the gypsum board industry* in violation of sections 1 and 2 of the Sherman Antitrust Act,' *is affirmed.*" (Emphasis supplied)

The Court's statement that the only violation was price-fixing is also erroneous because each of the defendant's patent license agreements *in toto,* not merely the price-fixing provisions thereof, was adjudged unlawful (1949 and 1951 Decrees, Art. IV; R. 475, 567).

The second erroneous statement of fact is that the only "undisputed issue of fact was that Gypsum** had given its

---

* This appears variously as follows in the Court's opinion: ". . . the only misuse ever *adjudicated* was that arising from the uniform price fixing provisions of the license agreements." (Slip Sheet Opinion p. 12); ". . . the District Court . . . granted summary judgment on the price-fixing violation. This left all of the other matters still at issue" (Op. 13); ". . . the only patent misuse that has ever been established in this long drawn-out litigation is concerted price fixing under the former patent licenses" . . . (Op. 14).

** The Court in its opinion referred to U. S. Gypsum Company as "Gypsum." It will be so referred to here.

competitors uniform patent licenses containing a price fixing clause" (Op. 12).

The record, to the contrary, as we shall specify hereinafter, shows many undisputed facts proving an aggregation of other industry-wide restraints and broad industry monopolization.

2. The Court made these errors *sua sponte*. Gypsum did not on this appeal challenge the propriety of the prior adjudications that it had violated Section 2 of the Sherman Act or that it had also engaged in restraints of trade other than price-fixing. National had no reason to anticipate from appellant Gypsum's brief the *ratio decidendi* of this Court's decision, and its brief and argument, therefore, were not addressed to it. By this petition National asks for its day in this Court on this question.

3. These errors are not minor mistakes. They go to the very heart of this Court's decision. They form the basis for the following two major rulings by this Court on this appeal which have resulted in the judgment of reversal:

The first ruling here made was that the Court below erred in holding that the violation continued unpurged through the 1948-1951 period. In arriving at this conclusion this Court stated:

> " . . . How, then, can we assume that this earlier violation, adjudicated for the first time in 1948, continued thereafter?
>
> *"The answer to this question depends on the nature and extent of that violation."* . . . (Op. 11) (Emphasis supplied)

It is therefore the holding of this Court that the "nature and extent" of the violation are controlling on the

issue of unpurged misuse. Appellee is entitled to a reargument on this issue of unpurged misuse on the correct, and not an erroneous, conception, of the nature and extent of the violation. For the nature and extent of the violation here was so pervasive throughout the industry that purge could not occur until the Final Decree (May 15, 1951) opened up the industry to adequate competition by reasonable royalty licensing to anyone in the industry.

The second ruling based on this erroneous conception as to the scope of the violation of law, and its factual premise, was that there was no warrant for the lower court's modification of its decree to enjoin pre-decree royalties. This Court stated that the findings as to the violation in the *Hartford-Empire* cases, 323 U. S. 386, 324 U. S. 570, "were much broader than anything found here", (Op. 17), and for that reason, among others, *Hartford* did not justify the lower court's modification. Appellee should be heard on the corrected premise that this case, like *Hartford*, involved both monopolization and an aggregation of restraints, of which price-fixing was only one.

If we are right that the violation here included monopolization and an aggregation of restraints, then, the District Court's holding should be affirmed. For in that event, there could have been no purge, as a matter of law, until the Final Decree of May 15, 1951; and, apart from purge, the discretion of the District Court, under the *National Lead* (332 U. S. 319) and *Hartford* cases, was properly exercised.

Each of these three points will be briefly developed in turn.

ARGUMENT.

I.

The plain errors of fact in the Court's opinion.

The basic error of the Court, we respectfully urge, is to treat this case as one limited to simple price-fixing. This Court misreads the record in saying that the only violation, and the only undisputed fact, was price-fixing.

The violation here found below and affirmed by this Court included monopolization as well as illegal price-fixing. And each of the license agreements, not merely the price-fixing provisions, was adjudged illegal. In addition, as hereinafter specifically shown, undisputed facts, deriving (1) from the face of the license agreements, and (2) from the undisputed bulletins issued thereunder, show an industry-wide aggregation of restraints, not merely price-fixing.

These undisputed facts show this Court is in error in its conclusion that the Government's charges of standardization of trade practices, elimination of jobbers, and restraints on unpatented articles are still in issue. Gypsum's proffer of proof on the Government's motion for summary judgment in 1949 did not even put these undisputed facts in issue; and this Court in its opinion in 1950 (340 U. S. 76), enlarging the District Court's decree, relied on these same undisputed facts as proven violations rather than as mere possible abuses to be thwarted by decree.

A. The violation was more than price-fixing—it included monopolization and additional industry-wide restraints.

After the original District Court granted summary judgment in 1949 for the Government, the question of the

scope of decree was there fully argued. The Government had submitted a proposed decree. In Article III thereof, the Government set forth findings of violations of both Section 1 and Section 2 of the Sherman Act (R.* 158-159). Gypsum, at that time, contended that only a violation of Section 1 had been shown.**

This contention was rejected by the District Court—it found that the defendants had violated both Sections 1 and 2. It so stated in Article III of the 1949 Decree (R. 475).

Gypsum appealed, and assigned as error this finding of monopolization (R. 506).

But this Court dismissed the appeal (339 U. S. 959). And on the same day it noted jurisdiction of the Govern-

---

* "R." refers to pages in the record on this appeal.

** Gypsum counsel argued to the original District Court:

> ". . . it would be quite possible . . . that any trial on the basis of which all of the Government's charges in the complaint were sustained by evidence in the case—of course it would be possible to find both a violation of Section 1, a combination and conspiracy to restrain; and, something different, that something different being the attempt to monopolize or conspiracy to monopolize under Section 2. *But, because of the disposition actually made of the case by this court, in other words the granting of a motion for summary judgment on the theory that the admitted facts with reference to the plurality of licenses justified the granting of the motion, it is our position that nothing more was determined which would authorize a finding of violation of Section 2 of the Sherman Act.*
>
> "By contrast, in our proposed Article 3 . . . we have attempted to define what we understand this court's decision to be as to the nature of the law violation. The defendant companies, by adhering to the minimum price provisions of the patent licenses in an entire industry, with knowledge of the adherence thereto of the others, acted in concert in restraint of trade and commerce among the several states in the Eastern Territory of the United States to fix, maintain and control the prices of gypsum board, in violation of Section 1 of the Sherman Anti-Trust Act." (R. 306, Emphasis supplied)

ment's appeal to enlarge the decree and explicitly affirmed the finding of monopolization in the language cited at p. 2, *supra*. This adjudication of monopolization remained intact in the 1951 Final Decree (R. 566-567).

Obviously, the District Court did not base its Section 2 monopoly adjudication on price-fixing alone.

This Court's view that the adjudication of illegality here was limited to the price-fixing provisions of the patent licenses conflicts also with Article IV of the 1949 and 1951 Decrees (R. 475, 567). That Article states:

> "Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void."

Gypsum had argued, to the contrary, that only the price-fixing provisions were illegal. Its proposed decree in the original District Court read:

> "1. The minimum price provisions of the Patent Licenses are hereby declared to be illegal.
>
> "2. Each of the Patent Licenses is hereby cancelled and terminated." (R. 192).

Thus the District Court in rejecting Gypsum's contention found illegal something more than the price provisions of the license agreements—it found the entire agreements illegal, and it also found illegal an aggregation of other restraints (hereinafter shown) upon which it founded its holding of monopolization.

B. The undisputed facts underlying the adjudications as well as the license agreements themselves proved more than an agreement to fix prices.

1. This Court in its enlargement opinion in 1950 (340 U. S. 76) clearly held that the intention of Gypsum to

restrain trade and to monopolize appeared right on the face of the agreements—that its intention was not restricted to price-fixing.

> "... the intention of United States Gypsum and its licensees to act in concert to attain the purpose of the conspiracy, restraint of trade and monopoly, *was apparent from the face of the license agreements.*" (340 U. S. at p. 83; Emphasis supplied)

Summarizing the restraints apparent from the face of the agreement, this Court in 1950 adverted to this statement from its earlier opinion at 333 U. S. 364, 389:

> "The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements."

Thus, it was not merely the "uniform price fixing provisions of the license agreements" (Op. 12) which were offensive, but many other restrictive provisions in the license agreements as well.

2. This Court has overlooked the undisputed fact in the record that under these license agreements hundreds of bulletins were issued by Gypsum which "are printed on nearly a thousand pages of the record" (333 U. S. 364, 382). Gypsum admitted in its answer in the original District Court that it enforced the terms and provisions of the bulletins (Para. 77, 1948 R. 290). "The trial court found that

'in the main' licensees complied with the bulletin conditions" (333 U. S. 364, 384).

Through provisions in these bulletins Gypsum controlled minute details of distribution. For example, it:

a. Forbade licensees to employ commission salesmen without the written permission of Gypsum.

b. Prohibited granting of long term credit.

c. Compelled licensees to adopt a uniform basing point system of pricing.

d. Specified board size and prescribed minimum quantities.

e. Enjoined sales on consignment.

f. Forbade licensees to deliver board directly to a building site. (See 333 U. S. 364, 382-383)

This Court in 1950 pointed out that not only did these regimenting practices exist but that Gypsum did not even deny them. It stated:

> "Defendants' offer of proof did not deny such effort to systematize sales" (340 U. S. 76, 91)

On the undisputed facts, therefore, the offense here was more than price-fixing—there was also broad regimentation as shown above.

By these bulletins, too, Gypsum brought about additional restraints—the elimination of jobbers, and restraints on unpatented products.

This Court now finds, erroneously, we submit, that the Government's charge as to elimination of jobbers is still at issue (Op. 12-13). This is wholly inconsistent with its two prior decisions—and with the record. There was not even any dispute at the trial that jobbers were in fact eliminated by reason of the discontinuance of the jobbers discount, brought about by Gypsum's bulletins (333 U. S. 364, 397-8). Gypsum's proffer of proof did not deny that

the effect of its bulletins was to eliminate jobbers (340 U. S. 76, 87). It stated only that there was no intention, agreement or understanding to eliminate jobbers (Proffers 56, 57, R. 51). This Court in 1950 held that such proof would be immaterial (340 U. S. 76, 87). Jobbers could not enter the field by buying gypsum board from Gypsum's licensees without the written consent of Gypsum. This restrictive provision was embodied in the license agreements (e.g. Gypsum-National agreement, 1948 R. 4365-4366). Gypsum's power to exclude all jobbers therefore continued so long as the license agreements were effective, i.e., at least until March of 1948.

Finally, this Court erroneously finds that the Government's charge as to restraints in unpatented gypsum products is still at issue (Op. 12-13).

On the Government's appeal in 1950 to enlarge the original 1949 decree, it asked that the decree be extended to include *all* gypsum products instead of *patented* gypsum board alone. This Court in 1950 did so. It enlarged the decree on the basis of undisputed facts (which the proffer of proof did not contradict) showing restraints in unpatented as well as patented gypsum products:

> "... The license agreements, as indicated above, required royalties on unpatented open edge gypsum board. Board Survey, the organization created to enforce the license agreements, found possibilities of price evasion to exist by a licensee's cutting prevailing prices on other commodities, sold in conjunction with patented gypsum board. Bulletins, issued to standardize sale practices, criticized rebates as violative to the license agreements. 333 U. S. 364, 386. Defendants' offer of proof did not deny such effort to systematize sales. Their explanation was that the efforts were to enforce legitimate license agreements and were not calculated steps in conspiracy or monopoly. We think the Government's

request that the decree's injunctions reach gypsum products, as defined in its proposed decree, is reasonable and should be allowed." (340 U. S. 76, pp. 90, 91)

To summarize—this Court in 1950 enlarged the Government's decree of 1949 because the undisputed acts of the defendants under the license agreements, not denied by the proffer of proof, with respect to (1) standardization of trade practices, (2) jobbers and (3) unpatented products, showed restraints as to these matters.*

C. The Court misinterpreted its 1950 opinion.

The Court, quoting a certain portion from its enlargement opinion of 1950** concludes therefrom that the District

---

* It is true, as the opinion herein states, that in the instance where this Court in 1950 enlarged one of its injunctive provisions to cover the western part of the United States, there was no evidence of unlawful conduct in that territory (Op. 14). This was the *only* enlargement not based on undisputed facts. All the others—as above set forth—were based on undisputed facts.

** The quotation from the enlargement opinion reads (Op. 13-14):

"We agree with a statement made by counsel for the Government in argument below that as a 'matter of formulating the decree' many facts offered to be proven would have effect upon the conclusion of a court as to the decree's terms. *However, we read the preliminary statement of the District Court . . . as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed-price licenses, accepting as true the underlying facts in defendants' proof by proffer.* The trial judges understood the summary judgment to be, as Judge Stephens said 'limited to that one undisputed question.' Judge Garrett and Judge Jackson agreed. That conclusion entitled the Government only to relief based on that finding and the proffered facts. On that basis we dismissed United States Gypsum's appeal from that decree, and on that basis we examine the Government's objection to the decree.

• • • • • •

"[A decree] is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly *through practices connected with acts actually found to be illegal.* . . . We turn then to the Government's proposals for modification of the decree on *the assumption that only a*

Court found a "narrow antitrust violation" (Op. 13); and the Court equates "narrow" with the "concerted price-fixing under the former patent licenses" (Op. 14), so that the only proved misuse which emerges is mere price-fixing. This, we respectfully submit, is an erroneous reading of the quoted portion of the Court's enlargement opinion.

Certainly, the statement in the enlargement opinion "'* * * we read the preliminary statement of the District Court . . . as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed-price licenses" is not an adjudication that price-fixing only was illegal. For everything that was illegally done by the defendants was done "*through* the fixed-price licenses" (emphasis supplied). As above (p. 7) indicated, this Court in 1950 pointed out that these licenses were illegal *in toto* and on their face. The agreements themselves formed the basis of what was done and what was intended. What was done encompassed monopoly as well as mere price-fixing, as we have shown. It also encompassed standardization of trade practices, elimination of jobbers, restraints on unpatented products—a complete regimentation of the industry.

Nor can it be said that the Court's reference to the "narrow limits of the proven violation" means that the violation was limited to price-fixing. Much of the Government's proof was put in issue by Gypsum's proffer. The restraints shown by the undisputed facts, and not put in issue by Gypsum's proffer (as this Court held in 1950) were, it is true, narrower (as the Court now says) than those alleged in the complaint. It is entirely inaccurate,

---

violation through concerted industry license agreements has been proven, but recognizing, as is conceded by defendants, that relief, to be effective, must go beyond *the narrow limits of the proven violation.*" 340 U. S. 87-89, 90. (Emphasis supplied)

however, to say that on this record the only restraint shown is price-fixing. The defendants' undisputed acts with respect to standardization of practices and restraints on unpatented products and elimination of jobbers were not merely "practices connected with acts actually found to be illegal." They were in themselves unlawful restraints, and taken together with all of the provisions of the license agreement, they formed the basis for the monopoly adjudication.

The crowning proof that this Court in 1950 regarded the violation here as industry-wide restraints and regimentation and monopolization rather than mere price-fixing is its reference to the *National Lead* case as the guiding precedent on matters of relief. This Court in 1950 in remanding this case to the lower court, stated:

> "In United States *v.* National Lead Co., 332 U. S. 319, 335-351, we recently dealt with problems of licenses and royalties after a finding of Sherman Act violation. The arrangements on account of which the companies manufacturing titanium pigments in that combination were adjudged violators *were as offensive to the prohibitions of the Sherman Act as those proven in the present case.*" 340 U. S. 76, 93. (Emphasis supplied)

In the *National Lead* case, the violation was not limited to price-fixing. It included other restraints and monopolization as well, *and the relief included an injunction against pre-decree infringement suits on the misused patents.*

In view of the above, the court below could hardly have read this Court's opinion in 340 U. S. as limited to price-fixing. The court below naturally followed the *National Lead* case, and in so doing, invoked a remedy which the *National Lead* case and *Hartford-Empire* (discussed later) held to be appropriate.

II.

The Court's errors were made *sua sponte*.

We have demonstrated that this Court's ruling that "the only patent misuse that has ever been established in this long drawn-out litigation is concerted price fixing under the former patent licenses" (Op. 14) is erroneous. This is also a ruling that the other restraints of trade and Gypsum's monopolization of the gypsum board industry in violation of Section 2 were never adjudicated. Nowhere in these proceedings did Gypsum make any contention which would occasion this ruling and it must be concluded that this Court arrived at it *sua sponte*.

In its Brief in Opposition to the Motion to Affirm (p. 10), and in its principal brief to this Court, (p. 69), Gypsum referred, without dispute, to the Trial Court's description of the "heart of the final decree" as the adjudication in Article III of the decree, affirmed by this Court, "that the defendant companies had acted in concert in restraint and monopolization of trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Act." Gypsum made no attempt either on this appeal or in the Court below to challenge this finding. It acknowledged in its principal brief (p. 55) that price-fixing was not the only adjudicated violation, by stating, in support of its claim to purge, that "price fixing and *all other objectionable features* had been removed" from its license agreements (emphasis supplied).

By the same token, since the matter was not argued by Gypsum it was not argued by National which could not reasonably anticipate that this Court in effect would overrule its earlier decisions in 339 and 340 U. S. and those of the District Court as embodied in Articles III and IV of

the decrees of 1949 and 1951. Since National could not reasonably anticipate the *ratio decidendi* of this Court on an issue not raised by the appellant, National has been deprived of the opportunity to be heard on the scope and meaning of the prior ajudications. Consequently, National now respectfully requests that opportunity.

III.

The Court's factual errors formed the basis of its two controlling rulings.

The factual errors made in the opinion herein go to the very heart of this controversy. If corrected, as they should be on rehearing, it necessarily follows that the decree below should be affirmed.

The extent of the violation, and the facts on which it rested, formed the basis of two controlling rulings made in the opinion herein.

The first ruling was that the Court below was not justified in holding that there was unpurged misuse until (at least) the Final Decree of May 15, 1951. The second ruling was that the *Hartford-Empire* case did not justify the modification by the court below of the 1951 Decree so as to enjoin pre-decree royalties. Both rulings depend on the assumption that the violation was a narrow one of price-fixing.

On a corrected appraisal of this record, extensive patent misuse has been found. The fount for the aggregation of restraints and monopolization was the illegal patent license agreements. There is no dispute that these agreements continued in effect until at least March, 1948, when most licensees ceased their payment of royalties. There is no dispute that the licensees' payments until March, 1948

were for unpatented as well as for patented board (supra, p. 10). There is no dispute that until March, 1948 (indeed, until this Court's injunction of May, 1950), Gypsum had the power to implement the price-fixing provisions of its license agreements by issuing new bulletins. There is no dispute that the license agreements, so long as they remained in effect, gave to Gypsum the power to prevent its licensees from selling gypsum board to jobbers. There is no dispute that the scope of the violation included not merely the price-fixing provision of the patent licenses but the entire agreements (1949 and 1951 Decrees, Art. IV). Patent misuse continued, certainly, at least until March, 1948.

On this record, therefore, Gypsum's appeal presented two questions to this Court—neither of which was passed on:

A. Did the District Court properly hold that the Roos patent which was misused to accomplish an aggregation of restraints and to monopolize an industry was not purged until the Final Decree of May 15, 1951? The reasons for the District Court decision were (1) the patent misuse having continued until at least 1948, the burden of going forward to show purge shifted to Gypsum, and Gypsum never met this burden; (2) in any event, a patent so misused is not purged until it is made available to applicants at a reasonable royalty and free of restrictions; and this event occurred for the first time on May 15, 1951.

B. Apart from purge (Op. 1C), did the District Court properly modify its decree in the light of the *Hartford-Empire* and *National Lead* precedents so as to enjoin pre-decree royalty claims?

A.

1. The Court states (Op. 15):

> "... The record shows, without dispute so far, that for seven years before the beginning of the 1948-1951 period Gypsum had not engaged in price fixing, and that for two of those three years price fixing had been under injunction. These factors raised a sufficient inference of purge prior to the critical period to entitle Gypsum to go to trial on the point, and to prevent the court from granting what in effect was summary judgment."

If we are correct in our premise that the adjudication here involved more than price-fixing, and that the misuse continued until at least March, 1948, then it follows that the Court is in error in stating that the above factors raised sufficient inference of purge prior to the critical period.

Since it was the entire agreement that was illegal and not merely the price-fixing provision, neither failure to enforce the price-fixing provision, nor the Court's 1950 injunction, which ran against price-fixing (339 U. S. 960), can raise an inference of purge during the critical period.

It is clear that a patent does not automatically become enforceable when misuse terminates. A considerable period of time may elapse, depending upon the nature and extent of the misuse, between the termination of the misuse and the dissipation of its consequences—i.e., purge. Under the decisions of this Court the burden of going forward to prove purge rested on Gypsum.* Gypsum had ample

---

* In *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498 (1942), this Court stated:

> "... petitioner suggests that it is entitled to relief because it is now willing to give unconditional licenses to manufac-

opportunity to show that it had effectively purged the misuse of its patents during the critical period. The fact is that it made no offer whatever to do so in the lower Court, and did not attempt to meet its burden.

Gypsum chose to proffer nothing; the District Court properly assumed it had nothing to prove; and the District Court therefore properly ruled that appellees were entitled to a summary judgment of non-purge.

On this record there was active misuse until March, 1948, monopolization and an aggregation of restraints; and Gypsum utterly failed to meet its burden of going forward to show purge during the critical period (March, 1948-May, 1951).

2. Irrespective of considerations of the burden of going forward to show purge, we respectfully submit that on a correct appraisal of the scope of Gypsum's patent misuse the Court should hold that no purge could have occurred with respect to Roos Patent 2,017,022 until it was made available to applicants at a reasonable royalty and free of restrictions, an event which occurred for the first time on May 15, 1951.

If we assume, correctly on this record, broad industry monopolization and an aggregation of restraints, it is not

---

turers on a royalty basis, which it offers to do. It will be appropriate to consider petitioner's right to relief when it is able to show that it has fully abandoned its present method of restraining competition in the sale of unpatented articles and that the consequences of that practice have been fully dissipated."

In *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 493 (1942), this Court stated:

"Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated."

unreasonable to hold, as a proper application of the law of purge, that this patent cannot be deemed purged until it is thrown open to the public at a reasonable royalty and free of restrictions. In such circumstances it is not unreasonable to say there could be no purge until a final effective decree was entered on May 15, 1951.

At any rate, this Court should hear argument and pass upon these questions now, since they are the real questions of purge presented to it on this record. See National's main brief pp. 69-77.

B.

Apart from purge, we respectfully submit that the modification made by the Court below in this case of industry monopolization and aggregation of restraints, was properly within its discretion. The modification provided the same remedy as the *National Lead* case had provided; and the *National Lead* case was set forth by this Court in its enlargement opinion (340 U. S. 76) as a guide to the lower court on appropriate remedies. At any rate, the propriety of the lower court's exercise of discretion in modification of its decree should be argued and passed upon by this Court in light of a correct appraisal of the prior proceedings. See National's main brief pp. 54-59.

Conclusion.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the decree of the District Court, upon further consideration, be affirmed.

Respectfully submitted,

SAMUEL I. ROSENMAN,
ELMER E. FINCK,
SEYMOUR D. LEWIS,
MALCOLM A. HOFFMANN,
SEYMOUR KRIEGER,
GILBERT S. EDELSON,

Attorneys for
NATIONAL GYPSUM COMPANY

Of Counsel:

FINCK & HUBER,
804 Liberty Bank Building,
Buffalo 2, New York.

ROSENMAN GOLDMARK COLIN & KAYE,
575 Madison Avenue,
New York 22, New York.

SEYMOUR KRIEGER,
777 Fourteenth St., N.W.
Washington 5, D. C.

Certificate of Counsel.

I, SAMUEL I. ROSENMAN, counsel for the above-named appellee, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....

SAMUEL I. ROSENMAN
Counsel for
NATIONAL GYPSUM COMPANY